

# **May I Get That Door For You—Judge as Gatekeeper**

**Scenarios & Excerpts of  
Applicable Indiana Rules of  
Evidence**

## **SCENARIO # 1**

In a trial for Murder and Burglary, the trial court holds a hearing to determine the admissibility of the testimony of a forensic pathologist with four years experience who the State intends to offer for his opinion of decedent's medical condition and degree of willingness in various Polaroid photographs of her in bondage. At the pretrial hearing he testifies that he deals with investigations of death that are sudden, unexpected, or unnatural and that a majority of his study and research is involved with autopsy. Having reviewed Polaroid photographs seized from the Defendant's residence, he testifies that, based on his forensic training and the photographs taken as a whole, it was his opinion that Decedent was an unwilling participant and that she was incapacitated, unresponsive or unconscious in many of the photos. He noted handcuffs on the right wrist, and he also noted red lines, marks, and bruises on the right wrist that appeared to be contusions. In his opinion, such marks were consistent with somebody trying to get out of restraints. He had seen similar marks at the autopsy of individuals who struggled trying to get out of handcuffs, and on individuals who have been bound against their will and attempted to get out of ligatures.

You are the judicial officer and gatekeeper on this case – will you allow these opinions to be stated before the Jury?

## SCENARIO # 2

At trial, the State presents testimony from an investigating Detective who has been qualified as a “blood spatter” expert” No objection is made to that portion of his testimony concerning “blood spatter” evidence. During his testimony Detective testified that he observed duct tape covering the Victim’s face. The following exchanged then occurred:

Q. [Prosecutor] In your experience as a homicide investigator with your training, did that-the existence of that duct tape on this victim's face have any significance to you or the other investigators?

A. [Detective] Yes it did.

Q. [Prosecutor] In what way?

A. [Detective] During the training, an investigator is taught to, you know, pick up on certain clues, behavioral traits that we might find as far as evidence, something that happened in the thing. Oftentimes if a victim is masked, so to speak, by his face is covered, that's sometimes used as a sign-

[Defense Counsel] Objection lack of foundation.

A bench conference is held at which the judge questioned whether the State had qualified the Detective as having expertise in the area in which he was about to testify. The State then proceeded to lay a purported foundation for Detective’s testimony. Responding to a number of questions posed by the State, Detective Richmond testified that he had investigated a large number of homicide scenes, and attended numerous homicide investigation seminars, some of which involved “conducting investigations of the crime scene as far as association with suspect and victim relationship, stranger homicide or killings....” When asked about the content of the seminars, Detective responded, “[t]hey discuss previous cases, documented cases, proven investigative techniques that other officers have used in the past.” Detective went on to say, “there are materials that were given to read. I have library books on all the different varieties.” Over Defendant’s objection, that the State failed to lay a foundation demonstrating scientific reliability, Detective testified:

A. [Detective] It's been my training that oftentimes when a victim's face is covered, it's done to disassociate the victim from the suspect. It turns the victim from a person to an object.

Q. [Prosecutor] And in your experience and training, is that fact more associated with cases where the killer knows or has a relationship with the victim?

A. [Detective] Exactly.

Was this evidentiary ruling in error?

### **SCENARIO # 3**

In a criminal trial where the defense of insanity has been properly raised by the Defendant, the State called Psychiatrist to testify about his evaluation of Defendant with regard to the issue of her sanity at the time of the offense. Psychiatrist testifies, "...psychiatry is a very inexact science if I could even call it a science" and "frankly common sense is really probably the best approach to psychiatry anyhow, and trying to then figure out or distill out the facts that are known and then try and come up with an educated guess. We in the field of psychiatry make educated guesses, we don't know and so we're making an educated guess as to what was going on in the mind of the defendant at the time of the alleged crime." Defendant objects to further testimony from Psychiatrist due to lack of foundation for an expert opinion.

How do you rule on this objection?

## SCENARIO # 4

As a basis for his opinion, Expert relied on his training and experience as an engineer and his areas of specialization which include “the performance of engineered structures in soils and the investigation and remediation of subsurface contamination.” He also relied on 1) evidence concerning the demolition and construction activities that occurred around each site; 2) evidence that there were railroad lines in the immediate vicinity of each site; 3) evidence that after decommissioning, most of the subsurface containment structures were uncovered and exposed to rainwater; and, 4) his knowledge of hydraulic pressure inside a fully saturated structure. He also “personally inspected some of the subsurface containment structures at each site” and observed cracks in structure walls and also he relied on his observations at over 150 similar sites not at issue in the case

Expert testified based upon his cumulative effects theory that the cumulative effect of small disruptive events is the only logical explanation for the separation of mortar joints and cracking and breaking of the structures. The Defendants argue that Expert’s “cumulative effects” theory is inadmissible because the theory: “1) could not be empirically tested; 2) had not been peer-reviewed or even written down; 3) contained no standard or other bases for applying the theory; and 4) was not shown to be accepted (or even heard of) within the relevant scientific community.” In support of their objections the Defendants cite the following exchange from the deposition of Expert:

Q: Is this cumulative effect approach that you have applied to your valuation of these sites and these structures published anywhere that you are aware of, this approach, the theory, the technique that you applied; is it in any published material anywhere?

A: You seem to be inferring as if there's maybe some sort of standard out there that says how to do what I did in this case. And, you know, there isn't. Again, this is one of those things that I think is very individualistic. You are asked to evaluate a situation, and in doing so in this case I've decided what I think is appropriate to do that. And I've done that. But, you know, I'm not aware of any such thing that relates to this specific type of analysis out there.

How do you rule? Will you permit the admission of the Expert’s opinion based upon his Cumulative Effects Theory?

## **SCENARIO # 5**

At a personal injury trial, Plaintiff calls her treating Chiropractor as an expert witness. During testimony, Plaintiff questions Chiropractor regarding those matters upon which he relied in forming his Chiropractic opinion. Chiropractor testified that he relied on the medical records of the Plaintiff. Plaintiff then asked Chiropractor to testify regarding out-of-court statements made by physicians in medical reports. Defendant objects.

How do you rule?

## **SCENARIO # 6**

In personal injury trial, Physician testifies as an expert and opines that based upon his review of the Plaintiff's medical records, her ongoing pain and discomfort were proximately caused by the rear end collision she suffered at the hands of Defendant. On cross examination of Physician, Defendant seeks to question Physician on entries made in Plaintiff's medical records by other physicians regarding preexisting conditions of the Plaintiff. Plaintiff objects on the basis that the records are inadmissible hearsay.

How do you rule?

## **SCENARIO # 7**

On appeal, Defendant seeks reversal of conviction for child molesting on the basis that three of State's witnesses allegedly "vouched" for the victim. Psychologist testified that Child was "firmly based in reality," that she found no indications that R.S. had difficulty distinguishing fantasy from reality, and that R.S. had "a very balanced ability" to store and retrieve memories. Psychologist also testified without objection at trial, "And then as we got around to issues about why she was referred to me, they were consistent when I went back and looked at other data and corroborated with either the other stories that I had heard." Forensic Interviewer testified that details were important "because there are times when nothing has happened" and then testified that Child was able to provide details. Finally, Investigating Officer by testified he looked for corroboration of Child's account by interviewing siblings and viewing the Defendant's.

Should this conviction be reversed?



## **Rule 104. Preliminary Questions**

**(a) Questions of Admissibility Generally.** Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the Court, subject to the provisions of subdivision (b). In making its determination, the Court is not bound by the Rules of Evidence, except those with respect to privileges. Where a determination of admissibility under this paragraph requires resolution of a question of fact, the question shall be resolved by the preponderance of the evidence.

**(b) Relevancy Conditioned on Fact.** When the relevancy of evidence depends upon the fulfillment of a condition of fact, the Court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

**(c) Hearing of Jury.** Hearings on the admissibility of confessions shall in all cases be conducted out of the presence and hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

**(d) Testimony by Accused.** The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.

## **Rule 401. Definition of “Relevant Evidence”**

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

## **Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible**

All relevant evidence is admissible, except as otherwise provided by the United States or Indiana constitutions, by statute not in conflict with these rules, by these rules or by other rules applicable in the courts of this State. Evidence which is not relevant is not admissible.

## **Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Undue Delay**

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

## **Rule 602. Lack of Personal Knowledge**

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. A witness does not have personal knowledge as to a matter recalled or remembered, if the recall or remembrance occurs only during or after hypnosis. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness. This rule is subject to the provisions of [Rule 703](#), relating to opinion testimony by expert witnesses.

### **Rule 701. Opinion Testimony by Lay Witnesses**

If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

### **Rule 702. Testimony by Experts**

(a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

### **Rule 703. Bases of Opinion Testimony by Experts**

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. Experts may testify to opinions based on inadmissible evidence, provided that it is of the type reasonably relied upon by experts in the field.

### **Rule 704. Opinion on Ultimate Issue**

(a) Testimony in the form of an opinion or inference otherwise admissible is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact.

(b) Witnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions.

### **Rule 705. Disclosure of Facts or Data Underlying Expert Opinion**

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.